Supreme Court, U.S.
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No. 09-517

In The Supreme Court of the United States

PACIFIC INVESTMENT MANAGEMENT COMPANY LLC, et al.,

Petitioners,

v.

RICHARD HERSHEY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In a class action alleging manipulation in violation of the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 1, *et seq.*, the Plaintiffs' final merits expert report on liability and damages was submitted by the Defendants in a surreply filing on the FRCP Rule 23 motion to certify the action as a class action.

Plaintiffs' merits expert report provided evidence that all class members paid artificially high prices to buy out of their short futures contract positions. Defendants conceded that all class members had Constitutional injury and standing. But Defendants nonetheless assert that certain class members are supposedly "uninjured" because, unlike with statutory standing principles generally, Section 22 (a) of the CEA, 7 U.S.C. §25(a), supposedly superimposes on the CEA statutory standing analysis a requirement that actual damages be proved.

Question #1. Does Section 22(a) of the Commodity Exchange Act require proof of actual damages in order to establish statutory injury and standing under the CEA?

In an interlocutory review of the inherently conditional FRCP Rule 23 order on a motion for class certification, the Seventh Circuit Court of Appeals found no abuse of discretion or legal error in the District Court's specific findings and rigorous analysis concluding that Plaintiffs had proved all of the required elements of Rule 23(a) and Rule 23(b)(3).

On the Class motion, Defendants conceded that class counsel was "adequate" to represent the class

under Rule 23(a)(4). Defendants also conceded during the Seventh Circuit oral argument that the action was a proper class action to the extent of persons who sold prior to the first day of the Class Period. But Defendants argue, contrary to all Circuit court decisions, including the Decision below, that this particular class that included both buyers and sellers did not have adequate representation.

Question #2. Did the Seventh Circuit Court of Appeals erroneously refuse to modify the scope of the class by holding that the District Court did not abuse its discretion in finding "adequacy" under Rule 23(a)(4) in the representation of the class that included certain members who both purchased and sold?

PARTIES TO THE PROCEEDING

The Petition (p. ii) lists the individual and the corporations that are now parties to this proceeding.

Pursuant to Rule 29.6, respondent Breakwater Trading LLC states that it is a limited liability corporation, wholly owned by Breakwater Capital, LLC. Breakwater Capital LLC is in turn owned by 20 individual shareholders. Breakwater Trading LLC states further that no publicly held company owns 10% or more of its stock.

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REASONS FOR DENYING CERTIORARI

This is an appeal of an interlocutory class certification order. Review of such interlocutory orders by way of writ of certiorari is ordinarily inappropriate. See, *e.g.*, *American Construction Co, v. Jacksonville T. & K. W. Railway Co.*, 148 U.S. 372, 384 (1893); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993). This is particularly true of class certification orders, that are themselves conditional, and "subject to revision in the District Court". Fed. R. Civ. P. 23(c)(1); *Coopers and Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

The inherently fact-bound Rule 23 determination in this case does not conflict with any decision of this Court or any other Court of Appeals. It is Petitioner-Defendants' ("Defendants") arguments, not the Seventh Circuit Court of Appeals opinion ("Decision"), which are in conflict with other Circuits.

Class actions alleging manipulation of prices in the "esoteric"[1] commodity futures markets are exceedingly rare, averaging less than one per year for the last thirty-five years. Argument "E" *infra*.

Unlike the federal securities laws, Congress has never criticized, limited or sought to impose a "reform" experiment on class actions or other actions under the Commodity Exchange Act, 7 U.S.C. §1 *et seq*. ("CEA").

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[1] Commodity futures trading is "esoteric." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 356 (1982) quoting H.R. Rep. No. 93-975, p. 1 (1974), 1974 U.S. Code Cong & Admin. News at 5843.

Compare CEA *passim* Section 7 U.S.C. § 25(a) *with* the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in various sections of 15 U.S.C.).

On the contrary, private actions are "critical" to deterring manipulation in the commodity futures markets which have been plagued by manipulation and "bubbles" in recent years. Counterstatement of The Case "B" and Argument "E" *infra*.

Interlocutory review seeking to modify what Defendants conceded at oral argument in the Seventh Circuit Court of Appeals was a substantially proper class definition, is unwarranted and would address no important questions concerning the inherently conditional Rule 23 class certification order.

Contrary to the premise for Defendants' arguments, the Decision does not inject "uninjured" persons into the class nor otherwise conflict with the decisions of this Court or other Circuits or the requirements of the Rules Enabling Act, 28 U.S.C. §§2071-2077. *Compare* Defendants' Petition for a Writ of Certiorari dated October 30, 2009 ("Pet.") at 11-17. Rather, Defendants seriously misinterpret Section 22(a) of the CEA, 7 U.S.C. §25(a), Plaintiffs' merits expert report, and the Decision itself.

Injury. Plaintiffs' merits expert reports provided extensive evidence that Defendants committed multiple manipulative acts which caused artificially high prices throughout the Class Period. Seventh Circuit Court of Appeals Separate Appendix of Appellees ("S.Appx.") at 144-5.

If accepted by the finder of fact, this expert evidence established that all Class members suffered the injury of paying artificially high prices to buy out of their short positions in futures contracts. *Compare* S.Appx.144-5.

Defendants themselves submitted Plaintiffs' merits expert report as part of Defendants' surreply on the class certification motion.

Because of this demonstrated "injury", Defendants expressly concede that all Class members have Constitutional injury and standing. Pet.7.

Statutory Standing. Although they conceded such injury, Defendants nonetheless argue that Section 22(a) of the CEA deprives certain Class members of CEA statutory standing and injury.[2] Specifically, Defendants misinterpret Plaintiffs' expert report to show that certain of such concededly injured Class members who sold after May 9, 2005 will supposedly be found (at or after trial) to have received more price artificiality on their sale of June Contracts than they paid on their liquidating purchase of same. Pet.12.

Defendants argue that this means that these Class members (a) should not receive any damages, and (b)

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[2] Defendants did not raise their present, contrived statutory standing argument in the District Court, including on their motions to dismiss, their motions for summary judgment, nor their oppositions or surreply on class certification.

Instead all that Defendants argued was that certain named Plaintiffs lacked statutory standing because they traded in joint accounts.

moreover, should be **retroactively** regarded as having **lacked CEA statutory standing and injury** under Section 22(a) of the CEA from the outset of the action. Pet.11,15-17.

Compounding their foregoing errors, Defendants misinterpret the Decision as accepting that the foregoing Class members were "uninjured" but nonetheless deciding to allow them to remain within the defined Class and thereby enlarge their substantive rights in violation of the Rules Enabling Act and the decisions of this Court. *Id.*

First, the Decision did **not** use the word "uninjured". Decision *passim*. Second, the Decision did **not** find that there were uninjured Class members. *Id.* Third, the Decision clearly did **not** hold that, even though some Class members supposedly lack statutory standing and injury under the CEA, the Rule 23 class motion device enlarges their substantive rights here. *Compare, id. with* Pet.15-19.

On the contrary, the Decision expressly held that **statutory** standing "refers to a situation in which, although the plaintiff has been injured and would benefit from a favorable judgment and so has standing in the Article III sense, he is suing under a statute that was not intended to give him a right to sue; he is not within the class intended to be protected by it." Appendix to Defendants' Petition for a Writ of Certiorari dated October 30, 2009 ("Pet.App.") at 10a. And, notwithstanding Defendants' elaborate argument under Section 22(a) of the CEA, the Decision correctly found that "this is not such a case." *Id.*

Because the Decision rejects Defendants' "Class members lack CEA statutory standing and injury" premise for Defendants' "uninjured" Class members argument, the Decision does not purport to expand any Class members' substantive rights and clearly does not conflict with this Court's precedent or the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. *Id.*

Instead, the Decision applied such precedent to Plaintiffs' final merits expert report and the other specific facts and context here, including Section 22(a) of the CEA. Thus, Defendants' stated reasons for granting certiorari are non-existent. Any review of the Decision will devolve into an analysis of Defendants' arguments under Section 22(a) of the CEA, Defendants' misinterpretations of Plaintiffs' merits expert report, and the "esoterics" of open interest and other aspects of the commodity futures market.

COUNTERSTATEMENT OF THE CASE

A. The *Raison D'Être* For The Commodity Exchange Act Is The Prevention of Price Manipulation

The commodity futures markets provide the benefits of "the stabilization of commodity prices, the provision of reliable pricing information, and the insurance against loss from price fluctuation." *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1173 (8th Cir. 1971), *cert. denied sub nom. Cargill v. Butz*, 406 U.S. 932 (1972).

Price manipulation destroys all of these benefits. *Id.* Therefore, Congress **unqualifiedly** prohibits price manipulation in the futures markets. *Compare, Strobl*

v. New York Mercantile Exchange, 768 F.2d 22, 28 (2d Cir. 1985) ("a little manipulation" is permitted under the federal securities laws but all manipulation is prohibited under the CEA, 7 U.S.C. §1, *et seq.*).

Indeed, Congress' *raison d'être* for originally enacting and repeatedly enhancing the CEA has been to prevent, and provide ample avenues of redress for, futures price manipulation by "big traders."[3]

B. Congress Considered Private Rights of Action To Be "Critical" In Preventing Price Manipulation

Congress viewed private lawsuits as:

> **Critical** to protecting the public and fundamental to maintaining the credibility of the futures market.

[Emphasis is supplied in all quotes herein unless otherwise noted.] *Cange v. Stotler & Co.*, 826 F.2d 581, 594-595 (7th Cir. 1987) (*citing* to H.R. Rep. No. 565, 97th Cong., 2d Sess., pt. 1 at 56-7, *reprinted* in 1982 U.S. Code Cong. & Admin. News 3871, 3905-06); *accord, Merrill Lynch v. Curran*, 456 U.S. at 384-5 ("valuable supplement" to regulation).

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[3] *Compare Leist v. Simplot*, 638 F.2d 283, 304-6 n.24 (2d Cir. 1980) (Friendly, J.), *aff'd, Merrill Lynch Fenner & Smith v. Curran*, 456 U.S. 353, 384-85 (1982) ("*Merrill Lynch v. Curran*") *and* Section 3 of the CEA, 7 U.S.C. § 5 (core purpose of the CEA is "to deter and prevent price manipulation or any other disruptions to market integrity") *with Board of Trade v. Olsen*, 262 U.S. 1, 39 (1923) ("futures market lends itself to such manipulation much more readily than a cash market").

C. The Regulators In This Case Warned Defendants That They Would Face Private Law Suits If Defendants Did Not Stop Their Uneconomic Conduct

Indeed, Defendants were expressly warned by the regulators from the Chicago Board of Trade ("CBOT") that Defendants were engaged in uneconomic conduct in the June 2005 10-year U.S. Treasury note futures contracts ("June Contracts") that would lead to lawsuits by the "shorts"[4] in these contracts if Defendants did not stop. S.Appx.149,214; Declaration of Christopher McGrath ("M.Decl."), *Kohen v. Pacific Investment Management Co. LLC.*, No. 05 C 4681 (N.D. Ill., filed Dec 6, 2007) [Docket No. 346], Ex 120 at pp. 174-5.

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[4] "A commodity futures contract is simply a [standardized] bilateral executory agreement for the purchase and sale of a particular commodity." *Leist*, 638 F.2d at 322.

The "bilateral" aspect of the futures contract is that there is a seller and buyer. *Id.* The "executory" aspect is that the seller agrees that it will sell and the buyer agrees that it will buy, during a specific month in the future, the specified quantity and quality of the specified commodity at the price established by their respective trades on (in this case) the CBOT. *Id.*

The sellers are one-half of the bilateral futures contract and one-half of the commodity futures market. *Id.* They are referred to as "shorts." *Id.* The buyers are the other one-half, and are referred to as "longs." *Id.* The standardized futures contracts are written so that both sides owe their obligations to the clearing house of the exchange. *Id.*

D. Flouting Those Warnings, Defendants Made In Excess Of $1,000,000,000 In Profits And Engaged In Extensive Uneconomic Conduct That Artificially Inflated Prices To Five Times Higher Than The Previous All-Time Record

Flouting such warnings from the regulators, Defendants continued their uneconomic conduct and made over $1,000,000,000 in trading profits. Reply Memorandum In Support of Motion to Certify Class *Kohen v. Pacific Investment Management Co. LLC*, No. 05 C 4681 (N.D.Ill., filed Aug. 30, 2006) [Docket No. 126 at p.9].

Defendants purchased up to 87.26% of the long positions in the June Contract. M.Decl. Ex. 136.

Defendants purchased up to 42.46% of the deliverable supply of notes to satisfy long positions on such June Contracts. *Compare,* M.Decl. at Ex. 136 *with* Pet.App. 19a-20a *and In Re Matter of Fenchurch Capital Mgmt., Ltd.*, C.F.T.C. No. 96-7, 1996 WL 382313 (CFTC July 10, 1996) (for CBOT financial futures contracts, the deliverable supply is the portion of the cheapest to deliver ("CTD") note that is "readily available" to be delivered).

Defendants uneconomically demanded all-time record deliveries of 132,493 June Contracts, representing 93.1% of the total contract deliveries. M.Decl. Ex. 136; S.Appx.146-7.

No reported case of which Plaintiffs are aware has ever exonerated an alleged commodity futures manipulator who purchased percentages of the

markets even remotely approaching the levels that Defendants engrossed here.[5]

Moreover, Defendants' conduct intentionally went beyond manipulation. Section 9(a)(2) of the CEA, 7 U.S.C. §13(a)(2), makes it a **felony** (1) to **manipulate**, (2) to **corner**, or (3) to make **false reports** concerning a commodity.

A corner is "...in the **extreme** situation, obtaining contracts requiring the delivery of more commodities than are available for delivery." Commodity Futures Trading Commission ("CFTC") Glossary, available at http://www.cftc.gov/educationcenter/glossary/glossary_co.html (last visited on Jan. 14, 2010).

This is precisely what Defendants achieved during the May 9 – June 21, 2005 Class Period: Defendants' large purchases provided Defendants, by May 24, 2005, with long futures positions calling for almost three times more deliverable notes than existed in the deliverable supply of notes that were not already owned by Defendants. *Compare,* M.Decl. Exs. 136,139 *with* S.Appx.197 (readily available deliverable supply of notes estimated at $15 billion).

According to Plaintiffs' expert, Defendants' extensive uneconomic conduct caused extraordinary,

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[5] *Compare, e.g., Cargill,* 452 F.2d at 1160 (long futures holder manipulated with 24% of deliverable supply); *G. H. Miller & Co. v. United States,* 260 F.2d 286, 289 (7th Cir. 1958) (72.1% of deliverable supply); *In re Landon v. Butler,* 14 A.D. 429 (CEA No. 65, June 20, 1955) (21% of deliverable supply); *Great Western Food Distributors v. Brannan,* 201 F.2d 476, 481 (7th Cir. 1953) (29.3% of deliverable supply).

artificial increases in futures prices. S.Appx.144-5, 207. The June Contract prices reached all-time record levels of richness the first day of the Class Period and continued to inflate until, by May 24-25, the richness was five times higher than the all-time record prior to the Class Period. S.Appx.207; *compare,* M.Decl. Ex. 174 *with* M.Decl. Ex. 66.

Defendants' e-mail record contradicts their sworn testimony. The e-mails reflect, among other things, that Defendants specifically intended to force the shorts in the June Contract to make what Defendants knew were uneconomic deliveries or pay what Defendants themselves said were artificially high prices to buy out of their June Contract short positions. *Compare,* M.Decl. Ex. 119 at pp.235-36 *with* M.Decl. Ex. 50; *see also* S.Appx.167.

E. The Class of Short Traders Suffered The Injury Of Paying The Artificially High Prices That Defendants' Manipulation Caused, In Order To Buy Out Of Their Short Positions

In practice, deliveries on futures contracts are very rare. *Compare,* August 10, 2005 CBOT letter to the Futures Industry Association at p. 1, S.Appx.138 (futures market is not a substitute for the physical delivery market) *with* S.Appx.7, 137 and *Leist,* 638 F.2d at 283, n.2. More than 99% of futures contracts are satisfied by trading to liquidate. *Id.* That is, prior to the expiration of trading in the futures contract, market participants who initially had sold a contract (the so-called "shorts") will buy a contract. S.Appx.7.

This expectation of liquidation on 99-plus% of futures trades permits the liquidity and volume needed for a successful futures contract.[6] This is because persons who do not own or desire to own the specific underlying deliverable instrument, may nonetheless trade the futures contract for many different purposes.

The foregoing great imbalance in commodity futures trading --- in which only a few deliveries discipline an extraordinary trading volume --- is predicated upon the convergence of the price of the futures contract with the price of the deliverable instrument as the end of trading nears. S.Appx.138-9.

However, during the period when the open interest[7] was declining and convergence should have been occurring in the June Contract, Defendants' extensive

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[6] Wholly unlike investors in a stock corporation, trading in each commodity futures contract has a fixed end date by which all traders who have come into the contract must go out of it (or, in extremely rare instances, perform their delivery obligations).

The stock market expects that every trader will actually own or have borrowed (the seller) or actually receive (the buyer) a share of the stock. The commodity futures market makes the opposite expectation: virtually every trader will come into and go out of the market **without** making or taking delivery of the deliverable.

[7] Another of the many differences between stock and commodity futures trading is that the commodity exchange publishes the amount of the open interest, that is, the amount of un-liquidated contracts that are open each day. S.Appx.82,103-4. This open interest generally increases until approximately twenty days before deliveries are scheduled to begin. *Id.* Then traders generally cease to make new trades in the soon-to-expire futures contract and the open interest decreases to virtually zero. *Id.*

uneconomic conduct, including demanding all-time record deliveries, caused all-time record price ***di***vergence between the futures and cash prices. S.Appx.144-45, 207.

Defendants' uneconomic conduct and manipulation began on May 9, 2005, which was twenty-two days before the start of deliveries in the June Contract and at the time that new traders were no longer entering the June Contract and its open interest began to decline.

F. Defendants Conceded At Oral Argument Below That The Class Is Properly Certified To The Extent of The $1.83 Trillion In Short Positions Sold Prior To May 9

In the Seventh Circuit, Defendants conceded at oral argument that certification of persons who opened the short positions prior to May 9, 2005 was proper. See Transcript of Oral Argument at 6-7, *Kohen v. Pacific Investment Management Company LLC*, No. 08-1075, 2009 WL 925914 (7th Cir., April 1, 2009).

The amount of June Contracts open on May 9 was $1.83 trillion. S.Appx. 103-104. As the shorts bought back their contracts, the open interest declined to $18.6 billion by June 14 and $15.1 billion by the end of all trading on June 21, 2005. *Id.* Defendants conceded that the $1.83 trillion in short positions established prior to the Class Period by selling at zero artificiality,

and who made their liquidating purchases at allegedly artificial prices, are properly certified.[8]

G. Defendants Objected To The Inclusion In The Class Of The Very Persons Who, Contrary to Market Norms, Made New Sales of June Contracts After May 9 And Thereby Retarded The Degree of Artificially High Prices Caused By The Manipulation

At oral argument in the Seventh Circuit, Defendants continued to object to the inclusion in the class members who initiated their short position on and after May 9, 2005 --- when Defendants' manipulation began. Those persons allegedly received some price artificiality on their sale transaction.[9]

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[8] Applying the amount of price artificiality that Defendants caused to the minimum net liquidation each day (that is, to the decline in the reported open interest), Plaintiffs' expert calculated a "top down" conservative minimum of $632,000,000 in aggregate damages. Appendices to Defendants' Motion To Strike, *Kohen v. Pacific Investment Management Co. LLC.*, No. 05 C 4691 (N.D.Ill., filed Jun. 12, 2007) [Docket No. 277] at Ex. B ¶2. This conservative estimate is substantially less than Defendants' one **billion dollar profit** on their positions. Docket No. 126 at p. 9. It is a fraction of the aggregate damages that would be produced by using overall trading volume.

[9] The CEA does not define "actual damages" in Section 22(a). *U.S. Commodity Futures Trading Commission v. Enron Corp. and Hunter Shively*, 2004 WL 594752, *4 (S.D. Tex. Mar. 10, 2004); *In re Cannon*, 230 B.R. 546, 594 (W.D.Tenn. 1999). The term has been flexibly and liberally construed to include unjust enrichment, *Randall v. Loftsgaarden*, 478 U.S. 647, 660 (1986) (securities), as well as to achieve the CEA's remedial purposes. *See Leist*, 638 F.2d at 304.

But the economic theory of self-correcting forces of the market posits that, contrary to the normal avoidance of the June Contract as declines in its open interest begins, at least some new shorts will enter the market in order to sell into the artificially high prices caused by manipulation.

1. Plaintiff Breakwater Trading LLC Lost $15,513,288 on Such New Sales

Although excessive reliance on the self-correcting forces of the market has been discredited,[10] these new shorts theoretically reduce the degree of "success" of the manipulation. They reduce the degree of price distortion signals sent by the manipulation to the public and thereby help the public.

Helping the public in this manner, Plaintiff Breakwater lost $15,513,288 on its sales of June Contracts. See Declaration of Jennifer Tan, *Kohen v. Pacific Investment Management Co. LLC.*, No. 05 C 4681 (N.D. Ill., filed Oct. 15, 2008) [Docket No. 422], Ex I.

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[10] House Committee on Oversight and Government Reform, hearing, October 23, 2008, testimony of Alan Greenspan: "I made a mistake in presuming that the self-interest of organizations, specifically banks and others, were such that they were best capable of protecting their own shareholders and their equity in the firms.

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Mr. Greenspan: "Precisely. That's precisely the reason I was shocked...."

Transcript at pp. 33-34, 37 available at http://oversight.house.gov/images/stories/documents/20081024163819.pdf

H. Defendants Concede That All of These Class Members Have Constitutional Injury And Standing

In this Court, Defendants conceded that all Class members have Constitutional injury and standing. Pet.7.

I. Plaintiffs' Uncontested Showing That The Certified Class Was Extremely Homogeneous And Much Smaller Than Previously Certified CEA Manipulation Classes

On their motion for class certification, Plaintiffs submitted the affirmations and reply affirmations of Craig Essenmacher, Esq. and Professor Christopher L. Gilbert as well as an Affidavit of Thomas Rubio. Docket Nos. 64, 65, and 418. Plaintiffs demonstrated that the proposed class herein is much smaller and more homogenous than the (admittedly rare) classes on which CEA manipulation claims had been unanimously certified for the prior twelve years. Docket No. 87 at pp. 1-2; *see* Matrix and Argument "C" *infra* (describing Plaintiffs' uncontested showing and cases).

J. Defendants Successfully Achieved An Early Cut-Off To Discovery, Failed To Contest The Adequacy of Class Counsel, And Submitted Plaintiffs' Merits Liability And Damages Expert Report In A Surreply On The Class Motion

Before the class motion was decided, all discovery was completed, and the parties' merits and rebuttal merits experts reports had been exchanged.

Defendants submitted portions of one of Plaintiffs' merits expert report by Professor Craig Pirrong ("Pirrong Report") (and no rebuttal or Defendants' merits expert report) in Defendants' Surreply on the class motion. Def. Sur-Reply in Opp. To Motion for Class Cert., *Kohen v. Pacific Investment Management Co. LLC.*, No. 05 c 4681 (N.D.Ill., filed Mar. 28, 2007) [Docket No. 260] at 2-3.

The Pirrong Report contained extensive fact and opinion evidence that Defendants had committed multiple manipulative acts (S.Appx.144-5); and that these acts had caused June Contract prices to be artificially high. S.Appx.145.

On the class motion, Defendants failed to dispute various issues, including the adequacy of class counsel requirement of Rule 23(a)(4). *Kohen v. PIMCO*, 244 F.R.D. 469, 479 (N.D. Ill. 2007) ("Defendants have failed to dispute adequacy of counsel, and the Court is satisfied that plaintiffs' counsel will vigorously

prosecute this case").[11] In contrast, in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997), the class counsel were found not to be adequate.

Defendants did not request a hearing on the class motion. *See* Defendants' Opposition to Class Certification and sur-reply to Class Certification, *passim*.

K. The District Court Expressly Found That Plaintiffs Had Proved Each Requirement of Rule 23

On July 31, 2007, the District Court certified a class as follows: All persons who purchased, between May 9, 2005 and June 30, 2005 ("Class Period"), inclusive, a June 2005 10-year Treasury note futures contract in order to liquidate a short position (the "Class"). Pet.App.24a.

Citing to *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) and applying *Szabo*'s requirement that Plaintiffs must prove each element of Rule 23, the District Court specifically considered each element and specifically found that Plaintiffs had proved each requirement of FRCP Rule 23(a) and 23(b)(3). Pet.App.27a-39a.

The District Court also carefully considered each of Defendants' arguments and rejected as inapplicable to

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[11] *Compare* Plaintiffs Class Cert. Reply Br. at p. 23 (asserting that Petitioners failed to dispute Plaintiffs had established this aspect of Rule 23(a)(4)) *with* PIMCO Surreply, *passim* (failing to contest same).

the facts many of the legal precedents still offered by Defendants. Pet.App.24a-25a, 34a, 37a n. 4. Expressly addressing Defendants' argument that the defined class may include "uninjured members," Pet.App.25a, the District Court correctly determined that all class members suffered injury when they covered their short positions at artificially inflated prices. The District Court exercised its discretion to find that any netting calculations of the extent (not fact) of injury should more efficiently be managed and resolved when damages are normally proved. Pet.App.25a-26a. ("defendants' concerns over the final determination of net damages for some individual members of the class should be resolved in the damages stage of the litigation").[12]

L. After Defendants Conceded At Oral Argument That Most Of The Class Should Be Certified, The Seventh Circuit Unanimously Refused To Modify The Class

Defendants obtained interlocutory review under Rule 23(f) and conceded at oral argument of their appeal that at least a class of persons who sold short prior to May 9, 2005 was appropriate here. See Transcript, 2009 WL 925914 at pp. 6-7. After considering all of Defendants' arguments, the Court of Appeals refused to modify the class definition and unanimously affirmed the District Court. *See infra*

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[12] Defendants' own cases recognize the firmly established principle that district courts are granted a wide range of discretion in resolving manageability concerns because of their greater familiarity and expertise with factual matters in particular cases. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191 (3d Cir.2001) (collecting cases).

(correcting Defendants' misinterpretations of Decision). Defendants' petition for rehearing *en banc* was denied without dissent. Pet.App.52a-53a.

Defendants now seek further interlocutory review before this Court to modify the scope of the class definition contained in the inherently conditional interlocutory class certification order. Rule 23(c)(1)(C) (expressly providing that such certification "may be altered or amended before final judgment").

ARGUMENT

A. Not Only Is There No Conflict But This Court Would Be The First To Hold That Section 22(A) Of The CEA Requires Proof Of Actual Damages As A Prerequisite To Statutory Standing

Defendants' premise that there are "uninjured" members in the class is clearly wrong. See Reasons For Denying Certiorari *supra*.

Defendants ask this Court to become the first ever to hold (a) that "actual damages" is an element of a claim under Section 22(a) of the CEA rather than merely a limitation on the types of damages (b) notwithstanding Defendants' repeated arguments that "injury" and standing are different, Pet.16, if a Plaintiff fails to prove a supposed element of a claim at trial, then this retroactively means that the Plaintiff did not have statutory injury and standing from the outset, Pet.9a-10a, and/or (c) that "actual damages" is an element which, if not pled, deprives a plaintiff of the injury required for CEA statutory standing.

Defendants argue that, if this Court holds all the foregoing, then certain class members will (notwithstanding their conceded Constitutional injury) be "uninjured" class members, and the Decision will conflict with the precedent of this Court and the Rules Enabling Act by including those uninjured members in the Class. But the CEA is remedial legislation and the term "actual damages" has been flexibly construed and not necessarily equated with net damages.

Defendants cite cases under Section 22(a) that do not begin to suggest that the Court should become the first ever to make the foregoing holdings. Pet.15-17.[13]

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[13] Defendants' cases uniformly hold, without reference to the pleading of actual damages, that the only persons subject to a private right of action under Section 22(a)(1) are those involved in the disjunctive categories of transactions described in Section 22(a)(1). See:

- *Kolbeck v. LIT America, Inc.*, 923 F.Supp. 557, 566 (S.D.N.Y. 1996) (Mukasey, J.) (dismissing CEA fraud claims without mentioning "actual damages" but because the complaint pleaded "none of the listed relationships" in subparagraphs (A)-(D) with the defendants);
- *Damato v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 878 F.Supp. 1156, 1161 (N.D.Ill. 1995) (dismissing certain defendants because "the only persons subject to a private right of action under §22(a)(1)(C)(iii) of the CEA are the persons who sold or took orders for interests in the commodity pool"), *aff'd sub nom. Damato v. Hermanson*, 153 F.3d 464, 470 (7th Cir. 1998) (§ 22(a)(1) limits recoveries to actual damages resulting from one or more of the transactions referred to in subparagraphs (A) through (D)); and
- *Three Crown Ltd. P'ship v. Caxton Corp.*, 817 F.Supp. 1033, 1043 (S.D.N.Y. 1993) ("22(a)(1) lays out what are in essence 'conditions precedent' which must be alleged in addition to the elements required to plead a

A further reason to deny certiorari is that Defendants' citation to *Warth v. Seldin*, 422 U.S. 490 (1975), introduced by a "*see*" signal, Pet.16, contradicts Defendants' arguments. Although *Warth* did not discuss "actual damages," *Warth* did hold a plaintiff may not assert merely a "**generalized grievance**" or the rights of third parties, and described "the standing question . . . [as] whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth,* 422 U.S. at 500 (footnote omitted).

Compare, Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 n.2, 97 (1998) (statutory standing "has nothing to do with whether there is a case or controversy under Article III," *i.e.*, a demonstration of "injury-in-fact" and "effectiveness of the requested remedy," but whether the plaintiff "has a cause of action under the statute") *with Transnor (Bermuda) Ltd. v. BP North America Petroleum*, 736 F.Supp. 511, 522-23, n.15 (S.D.N.Y. 1990) (legislative history of Section 22 of the CEA shows that "actual damages" provision was intended "to limit a plaintiff's recovery to damages to assets which are traded" on the futures market).

Clearly, short sellers who pay the artificially high price caused by a "short squeeze" manipulation are not

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violation of one of the substantive violations of the CEA;" although plaintiffs had pleaded actual damage to their futures positions, their CEA claims were dismissed because "plaintiffs' theory of manipulation is not one for which there is a private right of action under §22(a)(1)(D)").

asserting "generalized grievances". Rather, they are complaining of, and were allegedly injured by the evil of price manipulation (*i.e.*, the artificial prices) that Congress has been trying to prevent for almost ninety years. See *Leist*, 638 F.2d at 328, 335-7.

Certiorari should be denied. But if there were any review of the Decision, this Court would agree with the Decision and find that all Class members clearly have statutory standing and "injury" under the CEA.

B. Certain of Defendants' Supposedly Conflicting Cases Expressly Recognize That The Class Certification Result Would Have Been Different In The Very Different Type of Claim Here

Based on their faulty "uninjured class member" premise, Defendants assert that a conflict exists between (a) how the Decision applied the "adequacy" or "predominance" requirements of Rule 23(a)(4) and Rule 23(b)(3) to the specific CEA manipulation claim and the final merits expert report here, and (b) how decisions in the other Circuits have applied such requirements to the very different claims and circumstances present there. Pet.12-15.

But there is no conflict. First, Defendants' premise fails because, unlike in Defendants' cases, all Class members here (a) were injured, (b) were injured in the exact same standardized contract in the exact same way, (c) were subject to the exact same rule set and violation, and (d) were actually proved, by the final merits expert report, to have been injured. Only the issue of the amount of damages remained.

Thus, very unlike the differing rule-sets or differing contracts or treatments which class members experienced and the very different violations present in Defendants' cases (Pet.12-15), Plaintiffs here made an **undisputed** demonstration that:

1. Each Class member purchased the exact same standardized, fungible and interchangeable June Contract during the period in which prices were alleged to be unlawfully high. Plaintiffs' First Amended Motion For Class Certification, *Kohen v. Pacific Investment Management, Co. LLC*, No 05 C 4681 (N.D.Ill., filed Jul. 5, 2006) [Docket No. 67] at pp. 1-2.

2. Each Class member did so in the exact same centralized CBOT market place subject to the exact same standardized customs, practices, and binding CBOT rules. *Id.*

3. The price that each Class member paid allegedly was unlawfully inflated by Defendants' exact same highly unusual departure from their prior history of conduct. *Id.*

4. Each Class member made the exact same legal claim with the exact same elements: Defendants manipulated upward the prices of the June Contract in violation of the CEA. *Id.*

5. The amount of unlawful price artificiality (the so-called "price ribbon") paid by each Class member would be (and was) established by the same common, class-wide econometric proof.

6. This common class-wide econometric formula was based upon the exact same corpus of objective historical facts. This included, for example, the exact same long history of (a) prices, open interest, volume of futures trading, (b) the pricing relationships between the June Contract and other instruments and, (c) the positions purchased or sold, the deliveries taken, and other conduct by Defendants. S.Appx.27-30.

7. Any artificiality received on any sales transaction by Class members during the Class Period could be netted against their artificiality paid—all as calculated by applying the price ribbon to the record of each Class member's specific trades (but **not** to the average artificiality for the day, as Defendants now misstate). M.Decl., Ex. 21 at pp. 50-52. (Plaintiffs specifically dispute that they or any Class members mentioned by Defendant are "net gainers".)

Consistent with the foregoing decisive factual differences between this CEA manipulation claim and the very different claims and circumstances in the cases Defendants cite, Defendants' own cases expressly recognized that the class certification results they were reaching would have been different if the claim were an open market manipulation case. *Compare Langbecker v. Electronic Data Systems Corp.*, 476 F.3d 299, 315 (5th Cir. 2007) (claims were not the uniform effort to prove misrepresentations about securities but efforts to "second guess" years of fiduciary judgments involving a multitude of considerations) *with Newton*, 259 F.3d at 188-89 (alleged fraud was not "on the market" but only on those class members whose trades could have been executed at better prices).

1. Given The Non-Standardized Contracts Held By The Class Members In *Valley Drug*, The One Sentence In That Opinion Does Not Represent A Conflict, Let Alone An Important Conflict On The Same Matter

Defendants try to overcome the foregoing harmony between their own cases and the Decision by focusing on one sentence from *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181, 1190 (11th Cir. 2003). There, three wholesalers (representing over 50% of the class) had unique cost-plus sales contracts that made the alleged violation beneficial to them under their unique contracts. Pet.12.

In this very different fact context, one sentence in *Valley Drug* stated that "net gainers" should not be included in the class. *Valley Drug*, 350 F.3d at 1190.

There is no conflict "on the same important matter" informing this Court's discretion to grant the petition. Supreme Court Rule 10(a).

Moreover, there is not even a lesser conflict between the Decision and *Valley Drug*'s one sentence dictum. Rather, the Seventh Circuit pragmatically reasoned as follows. While some cases contain language to the effect that "it must be reasonably clear at the outset that all class members were injured by the defendant's conduct," such cases "focus on the class definition; if the definition is so broad that it sweeps within it persons who could not have been injured by the defendant's conduct, it is too broad." *Compare*, Pet.App.10a-11a with Pet.12-13.

Again, here, all Class members purchased the same, standardized contract and all could have been (and were proved to have been) injured. But in *Valley Drug*, the wholesalers had very different, cost-plus contracts such that defendants' own records showed that more than 50% of the defined class members, from the outset of the litigation, were benefiting from the alleged violation that the private suit sought to stop. *Valley Drug*, 350 F.3d at 1190.

Defendants' other cases are even more distinguishable:

- *Phillips v. E.T. Klassen*, 502 F.2d 362 (D.C.Cir.), *cert. denied*, 419 U.S. 996 (1974) (representative plaintiffs were postal employees who had been offered retirement packages but the likelihood was that many Class members were "pleased" and would want neither to return to their former jobs nor refund their benefits. *Id* at 369. "The issue of defining the class, and its proper representation, may arise in some measure in all class actions, but it is not likely to cut as keenly when only future relief is sought. . . ." *Id.* at 368.)

- *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1277-1280 (11th Cir. 2000) (discriminatory treatment (not price manipulation, as Defendants misstate) claim under the Packers and Stockyards Act, 7 U.S.C. §§ 181 *et seq.*, that included in the class the persons who allegedly were discriminated in favor of; *Id.* at 1280);

- *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P.*, 247 F.R.D. 156, 166-69,

177 n. 2 (C.D.Cal. 2007) (class definition included large hospitals, who had sufficient market power to obtain favorable pricing without the challenged discounts, and small hospitals who relied upon such discounts);

- *Langbecker*, 476 F.3d at 304, 314-16 (ERISA claims charging breach of fiduciary duties for offering company stock as a plan investment and seeking damages and injunctive relief, 476 F.3d at 304, but tens of thousands of class member-plan participants maintained their investments in the challenged stock after the disclosures, undermining the claim);

- *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2009) (multiple non-standardized products sold by different producers in different markets over a twelve year period with divergent pricing patterns)

- *Newton*, 259 F.3d 154 (alleged breach of duty of best execution, had to be examined on a trade-by-trade basis in order to see if the execution was not the best);

- *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003) (non-market trading case which required estimates of the value to each class member of withheld caller I.D. information).

C. Defendants Fail To Manufacture A Conflict Among The Circuits On The Inquiry Demanded Prior To Certifying A Class

After more than ten years' experience with Rule 23(f), the circuits are strongly aligned in requiring more, not less, "rigor" in certifying classes. *Contrast*, Pet.17-22, citing *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). Defendants misstate several decisions and ignore scholarship demonstrating the uniform "rigorous analysis" performed by the circuits.[14]

Brown v. American Honda (*In re New Motor Vehicles Canadian Export Antitrust Litig.*), 522 F.3d 6 (1st Cir. 2008) found, not conflict, but that "[o]ur sister circuits agree that when class criteria and merits overlap, the district court must conduct a searching inquiry regarding the Rule 23 criteria". *Id.* at 24. The First Circuit did not reach the issue of whether findings were necessary and thus raised no conflict, holding instead that in this specific instance, plaintiffs' "novel and complex" theory as to injury affecting

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[14] Two authors who regularly represent defendants found "near unanimity." William Kolasky and Kevin Stemp, *Antitrust Class Actions: More Rigor, Fewer Shortcuts*, CLASS ACTION REPORTS, Vol. 30 No. 6, at 3 (Thomson Reuters Nov.-Dec. 2009) available at http://www.wilmerhale.com/files/Publication/da664923-f9dd-4b75-bd1e-f43f8806d246/Presentation/PublicationAttachment/140b9324-0138-4f0a-b8f4-f9d108e1ce15/Kolasky_AuthorArticle.pdf. "The courts of appeals have ... moved to inject much greater rigor into the class certification process." *Id.* at 2. Since 2005, nearly two-thirds of Rule 23(f) appeals have been from denials, giving rise to a "reasonable hypothesis" that district courts are denying certification in a higher percentage of cases due to the increased rigor required by the courts of appeals. *Id.* at 6-7, Tables 2&3.

potentially millions of negotiated vehicle purchases required a "searching inquiry" into the viability of the theory and the completion of class discovery.

Miles v. Merrill Lynch & Co., (*In re Initial Public Offering Sec. Litig.*), 471 F.3d 24 (2d Cir. 2006) and *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2009) are also unavailing. *In re IPO*, rather than illustrating that the lower courts are "perplexed" by the Rule 23 standards, Pet.18 n.4, took pains to note that in requiring district courts to make a "definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues," the Second Circuit was aligned with the "strong line of authority" of seven other circuits. *IPO*, 471 F.3d at 38-39, citing *In re PolyMedica Corp. Securities Litigation*, 432 F.3d 1 (1st Cir. 2005); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 319 (5th Cir. 2005); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356 (4th Cir. 2004); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001); and *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984).

Hydrogen Peroxide similarly required an examination of the factual record underlying the certification decision, the court noting its agreement with the decisions of seven other circuits. *Hydrogen Peroxide*, 552 F.3d at 316-20.

Finally, *Loftin v. Bande (In re Flag Telecom Holdings Ltd. Sec. Litig.)*, 574 F.3d 29 (2d Cir. 2009), contrasts the Fifth Circuit's approach on certification of Rule 10b-5 claims in *Oscar Private Equity Inv. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007)

with that of securities decisions in the Southern District of New York. But because the triggering of the fraud-on-the-market presumption---a substantive securities law requirement also not present in CEA manipulation cases---was **not** in issue, the Second Circuit had no need to reach it. Therefore, *Flag Telecom* exposes no conflict with *Oscar* in Rule 23 procedure (or even in how to handle securities law class actions). *Flag Telecom*, 574 F.3d at 39-40. Thus, there particularly is no conflict that can be addressed by review of this CEA manipulation class action.

D. It Is The Defendants' Discredited Argument, Not The Decision, That Conflicts With Other Circuit Courts Concerning The Application Of The Rule 23(a)(4) "Adequacy" Requirement To Classes That Include Persons Who Both Bought And Sold

1. Market Trading Cases

There is no conflict between the Decision and the decisions of this Court or other Circuit courts concerning the "adequacy" requirements of FRCP Rule 23(a)(4) in open market trading classes that include persons who both bought and sold. *Compare,* Pet.21-30. Indeed, Defendants **fail** to cite to **any** Circuit court decisions refusing to certify a CEA manipulation class action or even a securities fraud class action on the grounds of FRCP 23(a)(4) adequacy because certain members of the class both purchased and sold. Pet. *passim*.

In fact, the Decision is consistent with the other Circuit court decisions and almost all other decisions

in certifying classes of persons who both bought and sold. Lacking any conflict among the Circuits, Defendants' primary support for their proposed move in the wrong direction is *In re Seagate Technology II Sec. Litig.*, 843 F.Supp. 1341, 1359 (N.D.Cal. 1994). Although a class had been certified in *Seagate* some three years earlier, the *Seagate* District Court nonetheless mused that there might be various forms of potential class member conflict, including a potential "seller-purchaser" conflict in "shaping the evidence." *Id.*, at 1359, 1361; Pet., *passim*.

The *Seagate* Court acknowledged that courts had consistently rejected arguments that volatility in the amount of artificial price inflation at different points in the class period defeated adequacy or class certification. *Id.* at 1358-59. *Seagate* did not decertify the class, but resolved to conduct an evidentiary hearing (which, in fact, was never held). *Id.* at 1367.

The musings of *Seagate* contravene controlling Ninth Circuit law and have been repeatedly and almost unanimously "discredited." *See, e.g., In re Oxford Health Plans, Inc. Sec. Litig.*, 191 F.R.D. 369, 377 (S.D.N.Y. 2000). *Accord, e.g., Conn. Retirement Plans & Trust Funds v. Amgen, Inc.*, No. CV-07-2536, 2009 WL 2633743 at *6-7& n.9 (C.D.Cal. Aug. 12, 2009) (collecting cases); *In re Scientific-Atlanta, Inc. Sec. Litig.*, 571 F.Supp.2d 1315, 1334-35 (N.D.Ga. 2007) (collecting cases); *Freeland v. Iridium World Commn'ns Ltd.*, 233 F.R.D. 40, 49& n.11 (D.D.C. 2006) (collecting cases); *In re Daimler Chrysler AG Sec. Litig.*, 216 F.R.D. 291, 297& n.3 (D.Del. 2003) (collecting cases); *In re Gaming Lottery Sec. Litig.*, 58 F.Supp.2d 62, 70 (S.D.N.Y. 1999) (collecting cases).

Seagate itself recognized holes in its logic.[15] Although *Seagate* did not act on its discredited logic, Defendants cite to one district court decision which, in the sixteen years since *Seagate*, arguably did, by limiting the scope of class certification.[16] But neither this case nor Defendants' mis-cited other ones create an important conflict with the Decision.

Specifically, Defendants cite to dicta in *Ballan v. Upjohn Co.*, 159 F.R.D. 473, 485 (W.D.Mich. 1994)("the court need not adopt *Seagate II* in order to find Mr. Acito is an inadequate plaintiff, because Mr. Acito fails to satisfy the adequacy test under more conventional measures." As the sole representative, plaintiff was subjectively disinterested in and uninformed about the case, and plaintiffs' counsel had not performed adequately).

Incorrectly, Defendants claim support for *Seagate* from *Ziemack v. Centel Corp.*, 163 F.R.D. 530, 542-43 (N.D. Ill. 1995) (citing *Ballan*, but holding that it was premature to suggest that in-out stock traders would lack standing; denied motion to decertify pending joint

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[15] For example, *Seagate*, 843 F.Supp. at 1359-60, acknowledged *In re LTV Sec. Litig.*, 88 F.R.D. 134 (N.D.Tex. 1980): "We do not find such a potential conflict to be sufficient to deny class certification. Significantly, available techniques of proof such as econometric modeling are sufficiently demanding of internal consistency as to reduce the opportunity for such manipulation of data." *Id.* at 149.

[16] That case was *In re Physician Corp. of America Sec. Litig.*, No. 97-3678-CIV, 2003 WL 25820056 at *9-10 (S.D. Fla. May 21, 2003)(narrowing class definition where purchasers who retained stock after curative disclosures argued that disclosures were inadequate, creating issue as to proof of violation with class members who sold after disclosures).

status report on theories of liability, potential adverse interests of in-out plaintiffs, and sub-classing).

Other cases in which Defendants assert that the courts implicitly adopted Seagate's reasoning *sub silentio,* simply did not do so.[17]

In reality, it is the Defendants' position that is in conflict with the other courts. That is, at precisely the time when more deterrence of wrongdoing is needed in the futures and other financial markets, Defendants seek to hasten the rapid declines in deterrence by asking this Court to advance an argument that has been repeatedly rejected for thirty-plus years.

Moreover, CEA manipulation cases far longer and more complex than this one have found no problems with adequacy, and repeatedly certified classes in both the District and the Circuit courts.

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[17] One CEA manipulation case, *Premium Plus Partners, L.P. v. Davis*, No. 04 C 1851, 2008 WL 3978340 (N.D.Ill. Aug. 22, 2008), suffered from an abnormally defined class that included persons who traded for an indeterminate, long period after the alleged manipulation had ended. This created the type of unidentified or future class member problem that was even more present in *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997).

Although the District Court initially denied certification of far larger classes in the *Centurions v. Ferruzzi Trading Int'l*, No. 89 C 7009, 1994 WL 114860 (N.D.Ill. Jan. 7, 1993), and *McCullough v. Ferruzzi Trading Int'l*, No. 90 C 1138, 1993 WL 795256 (N.D.Ill. 1993) decisions cited by Defendants, the same Court later in the same case, did certify a smaller class. *In re Soybean Futures Litig.*, No. 89 C 7009, 1993 U.S.Dist. LEXIS 18738 at *33 (N.D.Ill. Jan. 11, 1994)).

The instant class is much smaller and less diverse than even the certified class in *Soybean Futures*. *See* Matrix.

Case Name	Time Period	No. of Futures Contracts	Class Members	Type of Manipulation
Plaintiffs' Proposed Class Here	31 trading days	1	Short futures traders	Exclusively Upward
In re Natural Gas Commodities Litig., 231 F.R.D. 171, 179 (S.D.N.Y. 2005), ***petition for review denied*** August 1, 2006 ("*In re Natural Gas*")	3 year class period	60	Short and Long futures traders	Upward and Downward
In re Sumitomo Copper Litig., 182 F.R.D. 85, 87 (S.D.N.Y. 1998) ("*Sumitomo III*")	2 year class period	36	Short and Long futures traders	Rolling
In re Sumitomo Copper Litig., 194 F.R.D. 480 (S.D.N.Y.	2 and a half year class period	30	Short and Long futures traders	Rolling

2000), ***appeal denied***, 262 F.3d 134 (2d Cir. 2001) ("*Sumitomo II*")				
In re Soybean Futures Litig., No. 89 C 7009 (N.D. Ill. Dec. 27, 1993) ("*Soybeans*")	41 trading days	2	Short and Long futures traders	Exclusively Upward

2. Inapposite Cases

Defendants also cite to non-CEA, non-open-market-trading cases which, rather than presenting any conflict regarding the requirements of Rule 23(a)(4), apply the requirements of Rule 23(a)(4) to radically different facts. Pet.22-25. In *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), this Court, noting that "[n]o settlement class called to our attention is as sprawling as this one," found a profound diversity of interests among manifestly-injured and exposure-only asbestos plaintiffs.

East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977) involved a trial dismissing plaintiffs' individual discrimination claims and the *sua sponte* certification on appeal of a class to be represented by those plaintiffs. This Court held that, having lost at trial, plaintiffs were ineligible to

represent a class of injured plaintiffs, and noted that "[o]bviously, **a different case** would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives." *Id.* at 406 n. 12 (citations omitted).

Valley Drug, 350 F.3d 118, emphasized that it was only the specific nature of the product (drugs experiencing inelastic demand) and the differing types of contracts (three national wholesalers with over 50% of the claims had cost-plus contracts that experienced unchallenged benefit from maintaining the status quo) that enabled it to conclude that a fundamental conflict existed under 23(a)(4). *Id.* at 1191.

E. More Deterrence Of CEA Manipulations, Not Less, Is Now Needed, And The Petition Involves No Issue Of Public Importance

Incorrect facts make bad policy. Defendants cherry-pick dated information to make empirical assertions about potential **securities** class action abuses. Pet.30-32.

First, there are no abuses in, and have never been any abuses in, CEA manipulation class actions. *Compare* Private Securities Litigation Reform Act, 15 U.S.C. §78u-4(b)(2) (finding abuses in securities class actions and imposing heightened pleading standards in securities cases) *with* CEA, 7 U.S.C. §1 *et seq.* (no finding of any abuses in class actions under the CEA).

Commodity futures manipulation class actions are exceedingly rare. A WESTLAW search for commodity manipulation class actions yielded only 32 entries,

going back to 1974.[18] When duplicate entries and non-commodity cases were culled from the list, only 14 cases remained, averaging fewer than one commodity manipulation class action filed every 2½ years.

After the implosion of the financial system and repeated "bubbles" in energy and other commodity futures prices, more deterrence from private lawsuits and regulation—not less—is needed. *Compare, Cange*, 826 F.2d at 584 (private actions are of "critical importance" to enforcement of CEA) *with* J. Blas and C. Flood, *Prices Were Hit By Asset Bubble, Says CFTC Head*, FINANCIAL TIMES, June 2, 2009, and C. Rampell, *Lax Oversight Caused Crisis, Bernanke Says*, THE NEW YORK TIMES, Jan. 4, 2010, p. 1 Col. 4.

Defendants do refer to thirty-year-old assertions of "blackmail settlements" in class actions generally. But the author, Judge Henry Friendly, separately emphasized the policy need for private suits against "big manipulators" in a case involving class actions in the commodity futures markets. *Leist*, 683 F.2d at 305.

Courts and commentators have long rejected the "blackmail settlements" charge against class actions. *E.g.*, Allan Kanner & Tibor Nagy, *Exploding The Blackmail Myth: A New Perspective On Class Action Settlements*, 57 BAYLOR L.REV. 681, 693-95 (2005) ("blackmail" concerns are unsupported either at law or

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[18] The search of the ALLFEDS database specified the following terms: "class /3 action /p commodit! /s manip!" The 32 entries included multiple decisions involving the same case in the district courts, the courts of appeal, and this Court, as well as non-commodity cases in which the search terms appeared.

by empirical evidence, and "hydraulic pressure on defendants to settle" is "itself more myth than reality," as dispositive motions and interlocutory appeals provide important legal safeguards against meritless class actions).

Defendants also cite *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995), but that Court expressly added that "[w]e do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle."

Indeed, to achieve their deterrence benefits, class actions must impart some pressure when the merits of the case are strong. Defendants have conceded in the Court below that a substantial class is proper here. 2009 WL 925914 at pp. 6-7. Therefore, the extensive merits record of Defendants' all-time record uneconomic conduct, and the resulting all-time record prices, is the only matter of importance to settlement, trial, deterrence, justice or "pressure."

Because they are wholly inapposite to this CEA manipulation class action, Defendants' empirical assertions about securities class actions would argue at most only for granting certiorari in a securities law case.

But Defendants' dated empirical assertions convey a misleading picture about even securities class actions. Defendants ignore the Cornerstone Research mid-year 2009 report, which showed a "pronounced drop off" of 22.3% in securities class action filings in the first half of 2009 compared to the first half of

2008,[19] and Cornerstone's 2009 year-end report confirmed that securities filings were down 24% from 2008.[20]

Although Defendants assert that securities class actions involve increasingly large settlements, their own sources show more than a 50% decline in average securities class action settlements in 2008. Pet.31 (citing Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, *Securities Class Action Settlements, 2008 Review and Analysis* 2, *available at* http://securities.stanford.edu/Settlements/REVIEW_1995-2008/Settlements_Through_ 12_2008.pdf.

Finally, suppose Defendants' empirical or other assertions had established a problem with the far more numerous federal securities or antitrust law class actions. The main issues in those class actions would not be addressed by granting certiorari here because this case does not involve (a) the fraud on the market, efficient market and loss causation issues that dominate securities class motion practice (pp. 29-30 *supra*), or (b) the suitability of plaintiffs' proposed impact model, issues that dominate antitrust class motions (where different products are sold in multiple

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[19] Cornerstone Research, *Securities Class Action Filings: 2009 Mid-Year Assessment* 2 (2009), available at http://securities.stanford.edu/clearinghouse_research/2009_YIR/Cornerstone_ Research_Filings_2009_MidYear_Assessment.pdf.

[20] Cornerstone Research, *Securities Class Action Filings, 2009: A Year in Review* 2 (2009), *available at* http://securities.stanford.edu/clearinghouse_research/2009_YIR/Cornerstone_ Research_Filings_2009_YIR.pdf.

locales pursuant to different contracts with different price profiles (pp. 25-27 *supra*)).[21]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[21] Pursuant to Supreme Court Rule 15.2, Plaintiffs dispute as incorrect Defendants' (mis)statements that Plaintiffs' expert reports supposedly are in conflict (see 2009 WL 925914 at *11), or supposedly reveal certain patterns of price artificiality, and that class members supposedly traded in certain patterns. Pet.23,26.

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APPENDIX A

United States Code Annotated
Title 7. Agriculture
Chapter 1. Commodity Exchanges

7 U.S.C. §25

§ 25. Private rights of action

(a) Actual damages; actionable transactions; exclusive remedy

(1) Any person (other than a registered entity or registered futures association) who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages resulting from one or more of the transactions referred to in subparagraphs (A) through (D) of this paragraph and caused by such violation to any other person–

(A) who received trading advice from such person for a fee;

(B) who made through such person any contract of sale of any commodity for future delivery (or option on such contract or any commodity); or who deposited with or paid to such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract;

(C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of–

(i) an option subject to section 6c of this title (other than an option purchased or sold on a registered entity or other board of trade);

(ii) a contract subject to section 23 of this title; or

(iii) an interest or participation in a commodity pool; or

(D) who purchased or sold a contract referred to in subparagraph (B) hereof if the violation constitutes a manipulation of the price of any such contract or the price of the commodity underlying such contract.

(2) Except as provided in subsection (b) of this section, the rights of action authorized by this subsection and by sections 7(d)(13), 7a-1(c)(2)(H), and 21(b)(10) of this title shall be the exclusive remedies under this chapter available to any person who sustains loss as a result of any alleged violation of this chapter. Nothing in this subsection shall limit or abridge the rights of the parties to agree in advance of a dispute upon any forum for resolving claims under this section, including arbitration.

(3) In any action arising from a violation in the execution of an order on the floor of a registered entity, the person referred to in paragraph (1) shall be liable for–

(A) actual damages proximately caused by such violation. If an award of actual damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under sections 2(a)(1) of this title for the floor broker's violation, such futures commission merchant may be required to satisfy such award; and

(B) where the violation is willful and intentional, punitive or exemplary damages equal to no more than two times the amount of such actual damages. If an award of punitive or exemplary damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) of this title for the floor broker's violation, such futures commission merchant may be required to satisfy such award if the floor broker fails to do so, except that such requirement shall apply to the futures commission merchant only if it willfully and intentionally selected the floor broker with the intent to assist or facilitate the floor broker's violation.

(4) Contract enforcement between eligible counterparties

No agreement, contract, or transaction between eligible contract participants or persons reasonably believed to be eligible contract participants, and no hybrid instrument sold to any investor, shall be

void, voidable, or unenforceable, and no such party shall be entitled to rescind, or recover any payment made with respect to, such an agreement, contract, transaction, or instrument under this section or any other provision of Federal or State law, based solely on the failure of the agreement, contract, transaction, or instrument to comply with the terms or conditions of an exemption or exclusion from any provision of this chapter or regulations of the Commission.

(b) Liabilities of organizations and individuals; bad faith requirement; exclusive remedy

(1) (A) A registered entity that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by section 2(h)(7) of this title or sections 7 through 7a-2 of this title, (B) a licensed board of trade that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by the Commission, or (C) any registered entity that in enforcing any such bylaw, rule, regulation, or resolution violates this chapter or any Commission rule, regulation, or order, shall be liable for actual damages sustained by a person who engaged in any transaction on or subject to the rules of such registered entity to the extent of such person's actual losses that resulted from such transaction and were caused by such failure to enforce or enforcement of such bylaws, rules, regulations, or resolutions.

(2) A registered futures association that fails to enforce any bylaw or rule that is required under section 21 of this title or in enforcing any such bylaw or rule violates this chapter or any Commission rule, regulation, or order shall be liable for actual damages

sustained by a person that engaged in any transaction specified in subsection (a) of this section to the extent of such person's actual losses that resulted from such transaction and were caused by such failure to enforce or enforcement of such bylaw or rule.

(3) Any individual who, in the capacity as an officer, director, governor, committee member, or employee of registered entity [FN1] or a registered futures association willfully aids, abets, counsels, induces, or procures any failure by any such entity to enforce (or any violation of the chapter in enforcing) any bylaw, rule, regulation, or resolution referred to in paragraph (1) or (2) of this subsection, shall be liable for actual damages sustained by a person who engaged in any transaction specified in subsection (a) of this section on, or subject to the rules of, such registered entity or, in the case of an officer, director, governor, committee member, or employee of a registered futures association, any transaction specified in subsection (a) of this section, in either case to the extent of such person's actual losses that resulted from such transaction and were caused by such failure or violation.

(4) A person seeking to enforce liability under this section must establish that the registered entity [FN2] registered futures association, officer, director, governor, committee member, or employee acted in bad faith in failing to take action or in taking such action

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FN1 So in original. Probably should be "a registered entity".

FN2 So in original. A comma should probably appear.

as was taken, and that such failure or action caused the loss.

(5) The rights of action authorized by this subsection shall be the exclusive remedy under this chapter available to any person who sustains a loss as a result of (A) the alleged failure by a registered entity or registered futures association or by any officer, director, governor, committee member, or employee to enforce any bylaw, rule, regulation, or resolution referred to in paragraph (1) or (2) of this subsection, or (B) the taking of action in enforcing any bylaw, rule, regulation, or resolution referred to in this subsection that is alleged to have violated this chapter, or any Commission rule, regulation, or order.

(c) Jurisdiction; statute of limitations; venue; process

The United States district courts shall have exclusive jurisdiction of actions brought under this section. Any such action shall be brought not later than two years after the date the cause of action arises. Any action brought under subsection (a) of this section may be brought in any judicial district wherein the defendant is found, resides, or transacts business, or in the judicial district wherein any act or transaction constituting the violation occurs. Process in such action may be served in any judicial district of which the defendant is an inhabitant or wherever the defendant may be found.

(d) Dates of application to actions

The provisions of this section shall become effective with respect to causes of action accruing on or after

the date of enactment of the Futures Trading Act of 1982 [January 11, 1983]: *Provided*, That the enactment of the Futures Trading Act of 1982 shall not affect any right of any parties which may exist with respect to causes of action accruing prior to such date.